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Nos. 79-1738 and 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

RICHARD NIXON,
Petitioner,
v.
A. ERNEST FITZGERALD,
Respondent.

BRYCE N. HARLOW and
ALEXANDER P. BUTTERFIELD,
Petitioners,
v.
A. ERNEST FITZGERALD,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S OPPOSITION TO MOTION OF MORTON, INA, DAVID, MARK AND GARY HALPERIN TO INTERVENE AND FOR OTHER RELIEF

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Dated: August 24, 1981

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Respondent A. Ernest Fitzgerald respectfully submits this Opposition to Motion of Morton, Ina, David, Mark and Gary Halperin to Intervene and for Other Relief (Halperin Motion).

After having had their full day in this Court, the Halperins now seek another, to anticipate or avoid a possibly adverse precedent. They seek to distinguish their case

from this and they argue that because of an agreement between petitioner and respondent to limit damages in this case, petitioner Nixon is primarily interested in a second chance to defeat them. It is obvious that these arguments provide no basis for intervention.

Intervention in cases pending before this Court has been granted rarely, and then only in the most extraordinary circumstances. The mere possibility of an adverse precedent has never been ground for intervention. The place to distinguish any precedent that may be set by a decision in this case, is in the Halperins' own case. There, if the need should arise, the Halperins will be free to brief and argue in the appropriate lower courts the "significant differences" that they find between this case and their own.

Moreover, in attempting to list these "significant differences," the Halperin Motion conveys an essentially inaccurate picture of the record.* This is said to be for the purpose of presenting issues "which only the Halperins will raise" (Halperin Motion at 8). But to the extent that such issues may be appropriate, this Court can rely on the three petitioners already in the consolidated Fitzgerald cases, Nos. 79-1738 and 80-945, to present them. If these cases are to be heard by this Court, respondent Fitzgerald will vigorously present his case, as

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* Thus, Fitzgerald's claim is based not merely on the Constitution and common law torts (Halperin Motion at 6) but also on the violation of two Federal statutes expressly intended to protect the rights of government employees to communicate with Congress. 5 U.S.C. § 7211 and 18 U.S.C. § 1505. Although more than eleven years have now passed since the date of his firing, Fitzgerald has still not been reinstated in a position equivalent to that from which he was fired (Halperin Motion at 7-8). *Fitzgerald v. Hampton*, C.A. No. 76-1486 (D.D.C. Mar. 3, 1981). Fitzgerald's protected speech was not criticism of his superiors (Halperin Motion at 8), but rather the admittedly truthful account of a substantial cost overrun in testimony before a Congressional Committee with the express permission of his superiors.

he has with marked success in other tribunals over the past eleven years.

For these reasons, respondent opposes the motion to intervene, although he remains of the view that this case is inappropriate for review by this Court for the reasons stated in his brief in opposition to the petition for certiorari.

The Halperin Motion also refers to the agreement between Fitzgerald and petitioner Nixon which was disclosed to this Court by the Joint Statement of the Parties filed on June 10, 1980, not June 18, 1980, as stated in the Halperin Motion at 9. A copy of the agreement with attached memorandum and joint statement is attached hereto. As recited in the joint statement, the agreement provides for payment based on this Court's decision on the then pending petition for certiorari and on subsequent proceedings in the District Court. From respondent Fitzgerald's point of view, by giving up the possibility of an ultimately larger jury award, he gained the assurance of a minimum recovery, even if this Court should rule against him on the immunity issue. Under the agreement, there remains the sum of $28,000 to be paid, or not, depending on the outcome of the case.

Respectfully submitted,

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Dated: August 24, 1981

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 74-178

A. ERNEST FITZGERALD,
Plaintiff,

v.

ALEXANDER P. BUTTERFIELD, RICHARD M. NIXON, AND BRYCE N. HARLOW,
Defendants.

AGREEMENT

It is agreed by and between Plaintiff A. Ernest Fitzgerald and Defendant Richard Nixon, through their counsel, this 18th day of May 1980 as follows:

1. On or before May 31, 1980, Defendant Nixon shall pay to Plaintiff Fitzgerald the sum of $100,000.

2. On or before June 30, 1980, Defendant Nixon shall pay Plaintiff Fitzgerald the additional sum of $42,000.

3. If the United States Supreme Court at any time grants Defendant Nixon's now-pending petition for a writ of certiorari, Docket No. 79-1738, then Defendant Nixon will pay Plaintiff Fitzgerald the additional sum of $28,000, above and beyond the amounts specified in Paragraphs 1 and 2 hereof, except that no payment shall be due under this paragraph if upon remand by the Supreme Court, the District Court dismisses the case as to Defendant Nixon without additional adjudication of the facts, other than upon the record as it presently stands.

Any payment required of Defendant Nixon under this paragraph shall be made within 30 days of the District Court order referred to above determining, upon remand, whether or not to dismiss the case as to Defendant Nixon.

4. If, on or before June 30, 1980, the United States Department of Justice has paid or has made a commitment to pay some or all of the costs and expenses (but not attorneys' fees) incurred by the Plaintiff and his counsel, Defendant Nixon's obligation under Paragraph 2 of this agreement will be reduced by the amount that the Department of Justice has paid or has made a commitment to pay. If Defendant Nixon should at any time become obligated to pay the $28,000 provided for under Paragraph 3 of this agreement, this amount shall be increased by the amount by which the payment under Paragraph 2 was or was to be reduced.

5. Upon the payment of the full amount due under the terms of this agreement, Plaintiff Fitzgerald and Defendant Nixon will promptly execute and file a stipulation dismissing with prejudice all claims against Defendant Nixon.

6. If Defendant Nixon should die before all payments required of him under the terms of this agreement have been made, then any payments which remain to be paid after his death shall be made by his estate.

7. If Plaintiff Fitzgerald should die before all payments due him under the terms of this agreement have been made, then any payments which remain to be paid after his death shall be made to his estate.

8. All payments to Plaintiff Fitzgerald required of Defendant Nixon under the terms of this agreement are in consideration of the dismissal of Plaintiff's claims for alleged violation of his constitutional rights and consequent mental distress and suffering, all of which claims are denied by Defendant Nixon here. This agreement

does not constitute any admission by Defendant Nixon of the validity of any of the claims and allegations set forth in Plaintiff's complaint.

/s/ E. Barrett Prettyman, Jr.
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/s/ R. Stan Mortenson
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Attorney for Defendant
Richard M. Nixon

MEMORANDUM OF COUNSEL

Undersigned counsel for the parties agree that it is in the interests of both parties that all the terms of the settlement agreement entered into this date remain confidential. Accordingly, counsel shall in good faith impress upon their respective clients the need for confidentiality with regards to the terms of settlement and will solicit their cooperation with regard thereto.

/s/ E. Barrett Prettyman, Jr.
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Richard M. Nixon

DATED: May 18, 1980

[Received Jun. 10, 1980]

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-1738

RICHARD NIXON,
Petitioner,

v.

A. ERNEST FITZGERALD,
Respondent.

JOINT STATEMENT OF THE PARTIES

Petitioner Richard Nixon and respondent A. Ernest Fitzgerald, by their undersigned counsel, jointly submit this statement to inform the Court concerning certain matters that have been the subject of erroneous news reports, which may have come to this Court's attention, and which concern the status of this case. The parties have learned that, following the announcement of this Court's May 19, 1980, action granting the petition for writ of certiorari in *Halperin* v. *Kissinger*, No. 79-880, some news agencies speculated that the instant action had been settled. This is incorrect. The parties continue vigorously to dispute whether the petitioner can be held liable to respondent in this case, a question presented to this Court by the instant petition. The parties have agreed at this stage to fix the amount of payments to

which respondent would be entitled in this case, but the amount of payment depends upon this Court's disposition of the instant petition and subsequent proceedings in the District Court. Therefore, the case has not been settled and is not moot.

Respectfully submitted,

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